

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LA UNION DEL PUEBLO ENTERO,
ET AL,

PLAINTIFFS,

vs.

GREGORY W. ABBOTT, ET AL,

DEFENDANTS.

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DOCKET NO. 5:21-CV-844-XR

TRANSCRIPT OF MOTION TO COMPEL
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
MAY 13, 2022

APPEARANCES:

FOR THE PLAINTIFFS:

CHRISTOPHER DOOLEY DODGE, ESQUIRE
ELIAS LAW GROUP LLP
10 G STREET NE, SUITE 600
WASHINGTON DC 20002

SEAN MORALES DOYLE, ESQUIRE
BRENNAN CENTER FOR JUSTICE
120 BROADWAY
SUITE 1750
NEW YORK, NY 10271

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DANIEL JOSHUA FREEMAN, ESQUIRE
U.S. DEPARTMENT OF JUSTICE
950 PENNSYLVANIA AVENUE
4CON 8.143
WASHINGTON DC 20530

FOR THE DEFENDANTS:

PATRICK SWEETEN, ESQUIRE
WILLIAM THOMAS THOMPSON, ESQUIRE
TEXAS ATTORNEY GENERAL
P.O. BOX 12548
MC 009
AUSTIN TX 78711

JOHN M. GORE, ESQUIRE
JONES DAY
51 LOUISIANA AVENUE, NW
WASHINGTON DC 20001

REPORTED BY:

GIGI SIMCOX, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
SAN ANTONIO, TEXAS

1 (San Antonio, Texas; May 13, 2022, at 3:30 p.m., in open
2 court.)

3 THE COURT: Good afternoon.

4 Let's call 21 civil 844, LUPE versus Abbott.

5 Who do we have for the LUPE plaintiffs?

6 MR. DODGE: Good afternoon, Your Honor, you have
7 Christopher D. Dodge, the Elias Law Group, on behalf of LULAC
8 plaintiffs.

9 THE COURT: Thank you.

10 And on behalf of the State?

11 MR. SWEETEN: Your Honor, Patrick Sweeten and Will
12 Thompson. Mr. Thompson is in the driver's seat today. I've
13 been in D.C. taking depositions, so he's going to handle the
14 legislative privilege motion today with the Court.

15 THE COURT: Thank you.

16 MR. THOMPSON: Your Honor, just for the clarity of
17 the record, we represent the legislators today.

18 MR. SWEETEN: That's correct.

19 THE COURT: That is correct. Thank you.

20 Well, we'll see if that's the case. Actually, you're
21 not, but, yeah.

22 Is there anybody else who is intending to make
23 arguments today? No. Okay.

24 So Mr. Dodge, or Mr. Thompson, whoever wants to take
25 this, my understanding is we're still talking over 280

1 documents. Is that what we are still talking about?

2 MR. DODGE: I believe the number is closer to 225,
3 Your Honor --

4 THE COURT: 225.

5 MR. DODGE: -- identified -- yeah. The total count
6 in those tables might be closer to 280, but there are
7 duplicates between the tables because the lawmakers asserted
8 multiple privileges as to several documents.

9 THE COURT: Okay. And so I'm assuming here that no
10 other agreements have been reached.

11 MR. DODGE: That's correct, Your Honor.

12 THE COURT: So, you know, you've all made your
13 arguments on the papers, and so I've read all of that. I
14 guess maybe the best way to proceed here is to go through
15 these three tables and try to figure out whether there's
16 privilege or no privilege.

17 So Table A, for the most part, appears to me, to be
18 documents that could possibly or potentially be subject to
19 legislative privilege. There's a few I'm questioning, and so
20 we can go through those. But before I start tackling this
21 first table, I guess I'd like to have an understanding of how
22 the Office of the Attorney General compiled these documents.

23 Did you just rely upon the legislators at issue
24 giving you hard copies? Did you get the things in native?
25 How did you get them?

1 MR. SWEETEN: Your Honor, I can speak to some of
2 that.

3 We reached out to those legislators. We met with
4 them regarding the subpoena and the scope of those subpoenas.
5 We -- you know, obviously that included electronic documents.
6 It included documents that are hard copies. So all of those,
7 you know, types of medium would be included in what would have
8 been collected from the legislators.

9 Then we began our privilege review of those
10 materials. We compiled the privilege log. We've already sent
11 out the documents that we felt were not privileged and
12 responsive to the subpoenas, and then we withheld those
13 documents that appear on the privilege log.

14 That's a general description of how we did it, Your
15 Honor.

16 THE COURT: So what I'm trying to figure out, though,
17 is so if you got some of these documents -- let's talk about
18 the emails first. If you got some of those documents, did you
19 get them native, or did you get them hard copy?

20 MR. SWEETEN: I don't want to tell the Court the
21 wrong information. I was not -- I was part of some of the
22 discussions. I think we certainly asked for that when that
23 was available, but we have others that I think could tell the
24 Court more about that.

25 Do you --

1 THE COURT: So the reason I'm asking for it, frankly,
2 is, I mean, the "to" and the "from" are sometimes completely
3 absent to the log. That's one problem.

4 And then the other problem is no one tells me whether
5 there is any blind carbon copies on these either. And so when
6 I'm trying to figure out whether there's been any waiver, the
7 privilege logs are lacking detail.

8 Mr. Thompson.

9 MR. THOMPSON: Thank you, Your Honor.

10 I think a member of the Court staff asked me to speak
11 from here, if that's okay.

12 My understanding is that to the extent we had the
13 information, "to" and "from," like in an email, that it's
14 provided in the log. At least that was certainly our goal and
15 it's my understanding of what was accomplished.

16 Oftentimes the legislators had hard copies of
17 documents. It may have been emails or may have just been
18 other things where information was just missing, and so we
19 didn't — you know, it's just a print-off of some document.
20 It doesn't say who it's to. It doesn't say who it's from. So
21 we weren't in a position to provide that information.

22 But our goal certainly was to provide whatever
23 information we had. I believe we have accomplished that. If
24 there was any instance where it appears that we failed to do
25 that, we would of course supplement the log.

1 THE COURT: Well, what emails? Did you review any
2 emails that were provided to you in native format?

3 MR. THOMPSON: So again, like Mr. Sweeten, I did not
4 personally review the emails. My understanding is that we did
5 get emails in native format that we did provide "to" and
6 "from" information when that happened.

7 THE COURT: Yeah. So the "to" and the "from"
8 necessarily don't bother me. It's the BCCs that I'm wondering
9 about. Are you -- is your office aware of any of the emails
10 having BCC in there that has not been annotated in the log?

11 MR. THOMPSON: I can say that I am personally not
12 aware of that happening. And I'm happy, of course, to check
13 with the rest of the team and get an answer to Your Honor on
14 that.

15 THE COURT: Okay. So then let's tackle this one at a
16 time then.

17 Let's talk about Table A, the legislative privilege.

18 So a lot of these documents seem to be hard copy
19 documents, either PDFs or word documents. To your point, I
20 don't think we can tell who actually was the drafter, and so
21 that seems to be one problem.

22 Where I'm heading with this is, let's just take a
23 hypothetical, okay, apart from all this list. I'm -- just
24 again, hypothetically, just because I see the name here, I'm
25 Representative Ashby. Some third party sends me this, *How to*

1 *do Voter Restriction*, from Washington, D.C., has nothing to do
2 with the Texas legislature. He gives it to the Representative
3 Ashby. In this hypothetical, I am Representative Ashby, and I
4 just make a few jots on this document.

5 I agree with you that the legislative privilege may
6 allow for that document to be redacted as to Representative
7 Ashby's notations, but why does the entirety of the document,
8 under my hypothetical, not get produced?

9 MR. THOMPSON: So a couple of responses to that, Your
10 Honor, and I want to make sure I understand the question
11 properly.

12 To the extent the question is what will the privilege
13 log show in that situation, if we are aware that anything came
14 from an outside source, I believe we've endeavored to note
15 that on the privilege log.

16 I believe we were successful in that. And that's
17 part of why the plaintiffs were able to make the arguments
18 they are in their motion about which documents are from
19 outside sources.

20 THE COURT: So I'm looking at, I think -- hopefully,
21 we're all talking off the same -- I'm looking at my law clerk.

22 The Table A, Table B, and Table C that I have is the
23 same thing you-all have, right?

24 MR. THOMPSON: Yes. It was attached to the
25 plaintiffs' motion.

1 THE COURT: Okay. So draft Table A in front of you.

2 MR. THOMPSON: I have it, Your Honor.

3 THE COURT: Author is completely blank.

4 MR. THOMPSON: So I think what that would mean in
5 this privilege log is that we had to reason to believe it came
6 from an outside source. At least some of the documents on
7 this first page of Table A that are missing an author describe
8 themselves as, you know, draft amendments to bills. And my
9 understanding, at least, is those would be draft amendments
10 that were produced in the senator's or the representative's
11 office.

12 THE COURT: So let's take a look at Item 2, *Report on*
13 *International Voting Practices*. I mean, who authored this
14 report?

15 MR. THOMPSON: Certainly, off the top of my head, I
16 do not know. I do not know --

17 THE COURT: So it certainly wasn't Representative
18 Cain, H.e didn't go through and do an analysis of
19 international voting practices, right?

20 MR. THOMPSON: Well, I guess I don't know. I assume
21 that's -- I assume it with Your Honor, but --

22 THE COURT: So that's my problem with the logs is
23 they don't provide me much guidance at all to make decisions.

24 Now let's turn to page 2, Notes and Bullet Talking
25 Points. This is Representative Cain, Line Item 14. I mean,

1 how do I know -- did his staff draft bullet points for him to
2 talk from, or did somebody from D.C. do that? I mean, there's
3 just no way for me to know.

4 MR. THOMPSON: Well, Your Honor, I think it is
5 typical for legislative staff to draft these kinds of bullet
6 points for the members, and I think that would be probably the
7 most reasonable assumption upon finding bullet points.

8 THE COURT: But you are relying on me to make an
9 assumption to make evidentiary rulings.

10 MR. THOMPSON: Well, so, to be clear, that our
11 position is that we would not necessarily make that assumption
12 because, as we have argued in our briefing, we believe that
13 legislative privilege can attach to information and advice
14 provided by people outside the legislative branch.

15 THE COURT: Okay. So then on that big picture note,
16 let's talk about that. I mean, how is it -- so we supposedly
17 have an open government. The people are supposed to know what
18 their representatives are doing.

19 And if so, throughout this process, though, we
20 recognize the deliberation privilege so that legislators can
21 talk to their staffs so they can reach appropriate decisions
22 on how they are going to vote, what they are going to draft,
23 and so I'm completely in agreement with that.

24 Anything that was drafted and was in between a
25 legislator and his staff, and we can talk about how far the

1 staff goes, but that's all privilege.

2 But if I'm a lobbyist in D.C. under my hypothetical
3 and I provide a report, and look at Line Item 34, that's a
4 report provided to Representative Murr's office by an
5 organization, from a third-party organization.

6 And there's a reference throughout this privilege log
7 to a briefing book. I can't tell whether the briefing book
8 was done by a member of the legislative staff, or was done by
9 this third-party organization here on Line 34.

10 MR. SWEETEN: Your Honor, on Representative Murr's
11 briefing book, that is something that he had because he was in
12 the -- he was on the committee and he was presenting SB 1
13 during the summer of --

14 THE COURT: Yeah, no doubt he had it in his hand.

15 MR. SWEETEN: It his notes and his -- and it contains
16 sort of his mental impressions and thoughts about the bill.

17 THE COURT: I completely agree with all that.

18 And so what I'm trying to figure out is, so I agree,
19 his writings, his mental impressions, his notes, all that gets
20 redacted.

21 But why does the underlying report from some third
22 party not get produced? That writing, that original writing
23 that he may have annotated on was not part -- not produced
24 pursuant to the legislative privilege.

25 Help me understand that.

1 MR. THOMPSON: Sure, Your Honor.

2 And so I want to be clear about what I stated
3 earlier. It is not our position that all communications with
4 third parties are legislatively privileged, of course. There
5 are plenty of communications with third parties or lobbyists
6 and such that would not count as privilege and would not --
7 are not included on this log.

8 But there are times when communications with third
9 parties are privileged because the privilege should turn on
10 the communication and the activity at issue, not on the
11 employment status of the individuals participating in the
12 communication.

13 So the reason -- I think Your Honor referred to this
14 as part of the "deliberative process." The reason society
15 needs legislators like other members of the government to be
16 able to deliberate with candor and confidentiality is that it
17 produces better and more informed decision-making.

18 You can receive candid counsel in a way that simply
19 would not be possible if all that counsel were going to be
20 subject to public disclosure. This is true for executive
21 privilege. It's all over cases like *Nixon*, for the President.
22 It's also true in the legislative privilege context.

23 THE COURT: So I just, I cannot buy that argument,
24 though. I mean, so let's take -- away from voting, let's just
25 take an oil issue.

1 If the oil industry drafts legislation, drafts
2 amendments, and gives it to a senator or a representative, and
3 the senator and representative uses that work product done by
4 an outside organization, in this case, my hypothetical, an oil
5 lobbying firm, your position is that the people of the state
6 of Texas should never be able to see that this work originally
7 generated from the oil industry.

8 MR. THOMPSON: No, for a couple of reasons, Your
9 Honor.

10 THE COURT: How? If it's no on that situation, how
11 is it different in this situation?

12 MR. THOMPSON: Two quick clarifications.

13 One, our position is not that no one is ever allowed
14 to see it. To the extent something is privileged, of course,
15 it's up to the legislator to decide whether to make it public.
16 And they sometimes do. Or to keep it confidential. Sometimes
17 they do that.

18 On the substance of the hypothetical, I believe that
19 we have explained in the log and in the declarations attached
20 to our briefing that these are third-party situations where
21 the third party is providing confidential information advice
22 where there's like a pre-existing relationship between the
23 third party and --

24 THE COURT: But they are not members of the
25 legislative staff or members of the legislature.

1 MR. THOMPSON: That's correct. When they are
2 described as third parties, I believe we were trying to
3 indicate that they are not members of the legislative staff or
4 members of the legislator -- of legislature.

5 If the line were drawn by the courts at who is a
6 formal member of the legislative staff, I think that would be
7 an oddly, formalist line for a functional analysis of issues
8 like privilege.

9 THE COURT: Well, help me understand. You are saying
10 that, and then in my oil example, you said, "Oh, no, there's
11 no privilege there."

12 MR. THOMPSON: Sorry. What I meant to say is those
13 facts as stated by Your Honor would not necessarily be enough
14 to establish the privilege. So if a lobbyist just walks into
15 an office and says, "I've got a draft bill. I think you guys
16 should really consider this," I don't think we would be
17 asserting privilege in that situation.

18 My understanding is --

19 THE COURT: So you are distinguishing it this way,
20 that because an outside entity -- and I don't know whether one
21 exists in this case or not. I'm just posing this as a
22 hypothetical. But if an outside entity wanted to assist the
23 State of Texas legislators in drafting restrictive voting
24 practices, you are saying that because these legislators might
25 have had some kind of pre-existing relationship with these

1 individuals who might share the same ideological perspectives,
2 all of a sudden now, that makes it part of the umbrella of the
3 legislative privilege?

4 MR. THOMPSON: So they may or may not share the same
5 ideological preferences. My understanding is legislators
6 sometimes get advice from people they expect to disagree with
7 all the time.

8 But I think the key here is — Your Honor has
9 undoubtedly heard of the Kitchen Cabinet, that it goes all the
10 way back to Andrew Jackson, where the President has outside
11 advisers who he relies on for information and advice in
12 performing his executive functions.

13 THE COURT: But I'm not here to talk about an
14 executive privilege. I'm here trying to understand the
15 legislative privilege.

16 MR. THOMPSON: It's just an analogy, Your Honor. I'm
17 not purporting to say the executive privilege is at issue to
18 those documents.

19 THE COURT: Because under that scenario I could be a
20 senator and my Kitchen Cabinet has all my lobbyist friends and
21 all my fundraising friends, and so, I mean, how far do you
22 take your analogy? Under that, my Kitchen Cabinet could
23 consist of a whole bunch of my political supporters, and all
24 of that becomes now under the umbrella of legislative
25 privilege?

1 MR. THOMPSON: The legislator in question, I do
2 believe is entitled to decide where he seeks out information
3 and advice for purposes of performing his legislative
4 functions.

5 THE COURT: I agree with that. That doesn't mean it
6 rises to privilege though.

7 MR. THOMPSON: Well, if we do not apply the privilege
8 wherever legislators find it necessary to get information and
9 advice, then it will necessarily inhibit the information and
10 advice in those circumstances.

11 So the same considerations that weigh in favor of
12 allowing legislators to use their staff, I think, weigh in
13 favor on legislators to draw on third-party resources, insofar
14 as there's a confidential relationship.

15 THE COURT: Okay. So again, I'm just like real
16 narrow. So let's just focus on Table A and legislative
17 privilege. Do you want to make any other arguments on that?

18 MR. THOMPSON: Well, Your Honor, I guess as I
19 understand where the plaintiffs are coming from on Table A,
20 and I'm sure my colleague on Zoom will correct me if I'm
21 wrong, I don't think they are really disputing the legislative
22 privilege, that those act within the scope of legislative
23 privilege.

24 I understand their argument to be that because they
25 believe the privilege to be qualified, the privilege should be

1 overcome by the fact that they have alleged discriminatory
2 intent in this case.

3 And so I don't think we've really touched on that
4 yet. I'm happy to --

5 THE COURT: And so the plaintiffs are asking for the
6 *Rodriguez* case, the five-factor balancing test, to apply. And
7 you say it should not apply.

8 MR. THOMPSON: Right. We say it should not apply,
9 and in the alternative we satisfy it.

10 THE COURT: So before I get away from Table A, who is
11 Elizabeth Alvarez?

12 MR. THOMPSON: My understanding is she is an attorney
13 who was retained by some legislators.

14 THE COURT: Do we know which ones?

15 MR. THOMPSON: I believe the ones for whom she is
16 listed on the log. I don't have any reason to disagree with
17 that.

18 THE COURT: And so she is not employed by the State
19 of Texas, she's just private counsel.

20 MR. THOMPSON: I understand her to either work at a
21 private law firm or have her own firm. I do not believe she
22 works at the Office of the Attorney General.

23 THE COURT: Nor does she work for the legislature.

24 MR. THOMPSON: I don't think she's a W-2 employee of
25 the legislature. I think she is retained counsel by

1 legislators.

2 THE COURT: And so then if there's any
3 attorney-client privilege that is applicable, it's only
4 between her and her retained clients.

5 MR. THOMPSON: I agree. That would be the
6 attorney-client privilege --

7 THE COURT: Yeah.

8 MR. THOMPSON: -- at issue.

9 There would be, of course, common interest extensions
10 of -- excuse me. Insofar as someone were to argue that the
11 attorney-client privilege had been waived by contacting a
12 third party, then we'd of course be in the common interest
13 extension of the attorney-client privilege analysis.

14 THE COURT: Well, normally there's a common defense
15 extension not a common interest.

16 MR. THOMPSON: Well, I think it depends on the court
17 you're in. But my understanding, we cited the restatement in
18 our brief and I think the restatement recognizes that common
19 interest applies to non-litigation matters.

20 THE COURT: Okay. Mr. Dodge, do you want to say
21 anything on Table A?

22 MR. DODGE: Yeah, I would, just to clarify what my
23 friend on the other side said, Your Honor.

24 The legislative privilege claims that we are
25 challenging here are bifurcated between Table A and Table B.

1 And Table B shows instances where on the face of the log the
2 privilege claim has been waived because the log identifies an
3 outsider to the legislative branch who was included on the
4 communications. That oftentimes was a constituent, such as
5 Mr. Alan Vera. That oftentimes was a private attorney, like
6 Miss Alvarez, who you identified. And sometimes it was also
7 members of the executive agencies within Texas.

8 Table A more broadly represents instances where the
9 State has simply failed -- or rather where the lawmakers have
10 simply failed to meet their burden showing that the privilege
11 applies.

12 And that's both under the *Perez* factors, but it's
13 also precisely what Your Honor hit upon, which is that this
14 table identifies things like reports, summaries, analyses that
15 were before the legislators when they were considering the
16 bill that are oftentimes, you know, produced by courts, and
17 the log is insufficient to evaluate whether or not they met
18 their burden there.

19 So that's not just a *Perez* factors claims, exactly
20 what Your Honor indicated, which is that, you know, if a
21 lobbying group or a think-tank were to provide these reports,
22 there's no reason to assume that they are privileged. So I
23 just wanted to clarify that point.

24 You also mentioned Miss Alvarez, and I'm glad to turn
25 to attorney-client privilege, but that's Table C, and it

1 sounds like Your Honor wants to discuss Table B.

2 THE COURT: Yeah. So with regard to Table A -- I'm
3 going to do this very linear so I don't mess up along the way.

4 So with regard to Table A, I'm going to probably take
5 all these documents into in camera review. I want to satisfy
6 myself because the log does not allow me to make these
7 determinations without looking at the documents on authors,
8 to, from, and CCs, and potentially BCCs, and the log doesn't
9 let me, and maybe a look at the actual document will indicate
10 that it was authored by some other party, and so maybe that
11 will help me understand legislative privilege.

12 I do agree, though, and at the very least what would
13 be redacted pursuant to legislative privilege would be any
14 notations, writings, anything like that made by the
15 legislators themselves or their staff members. So I agree
16 with that proposition, but Table A I'm going to have to take a
17 further review of.

18 Now --

19 MR. DODGE: And Your Honor, if I could --

20 I apologize, Your Honor, if I could just briefly
21 comment on that point about the handwritten notes.

22 Handwritten notes and the like, and any other sorts
23 of notations, nothing in the case law grants those kinds of
24 things special status under the legislative privilege. They
25 should still be evaluated under the five *Perez* factors.

1 And here, if you take a look at the declarations that
2 the lawmakers submitted in conjunction with their response,
3 they really put forth no evidence on the record indicating
4 that release of any of these documents, including their notes,
5 would have any chilling effect on their legislative activity.

6 And if you look at their response brief, I think
7 their discussion with the fifth *Perez* factors is chill, they
8 discuss it for all of two or three sentences without factual
9 support.

10 And so while I agree that the handwritten notes may
11 be more sensitive, the lawmakers here still have done very
12 little to meet their burden under the *Perez* factors showing
13 that those should not also be released.

14 THE COURT: So I'm going to give deference generally
15 to the legislature -- legislators rather -- on leaning towards
16 the redaction of anything, if I order it produced. And I may
17 not. But I'm going to give deference to the legislators'
18 writings, notations, mental impressions, this and that.

19 But I may apply -- I'm not saying I will -- I may
20 apply your client the *Perez* factors. I call it the *Rodriguez*
21 five-factor balancing test. And so I may look at that to see
22 whether or not that will be applicable as I make an
23 assessment.

24 And that one, I think it really needs to be done on a
25 document-by-document basis. I don't think I can make some

1 kind of a global assessment of those five factors. I think it
2 all depends on what each individual document shows.

3 So that's how I'll proceed on Table A.

4 So Table B. I think Table B appears to be documents
5 that could be subject to the legislative privilege but there
6 was waiver. And again, I have the same problem here where I
7 can't tell by the log. My log, in many cases, the "to," and
8 the "CC," and the "author" field, and the "subject" field even
9 are completely blank. In some cases it's filled in, but in
10 many cases it's not.

11 What am I to do with that?

12 MR. THOMPSON: Well, Your Honor, my understanding, of
13 course, is that we have provided all the information that is
14 available. If, you know, if legislators just have loose
15 documents in their files that do not have "to" and "from" on
16 them, then we're of course unable to provide "to" and "from"
17 information on the log.

18 I don't think that necessarily affects the privilege
19 analysis to these documents because, is it -- well, we can
20 take it document by document, but for many of these documents
21 we're talking about an analysis of what a legislator should do
22 in his legislative capacity. Is it for an amendment?
23 Should --

24 THE COURT: Yeah. So let's just take Number 2 on
25 that list for an example.

1 This is a February 9th, 2021 email from a third party
2 not employed by the legislator. I mean, there's no indication
3 of the "to," the "from," the "subject," the "author."
4 Nothing. I have nothing there.

5 MR. THOMPSON: I'm sorry, Your Honor. I'm trying to
6 look at the document to see if there's something I can tell
7 you about it.

8 MR. SWEETEN: Your Honor, that's B2, the document
9 that you were just referencing?

10 THE COURT: Right.

11 MR. THOMPSON: It does not appear, to me, to be an
12 email, which I think helps explain why we don't have the "to,"
13 or the "from" information.

14 THE COURT: But it came from somebody who was a third
15 party not employed by the legislature.

16 MR. THOMPSON: That is correct. It is a written
17 document.

18 I take it that the reason the log reveals that it was
19 written by a third party is because we wanted to be up front
20 in the privilege log and allow the Court to decide the
21 disputed question of law between the parties, whether, you
22 know, the involvement of a third party waives the privilege.

23 So as I understand the dispute between the parties,
24 the name of the individual who drafted this is probably not
25 material to the issue of law because both sides agree that the

1 person who drafted is not a W-2 employee of the legislature.

2 THE COURT: Let's go to 23 on there. It's a
3 presentation contained in Senator Bettencourt's file, but it
4 doesn't tell me who he gave the presentation to. It wasn't to
5 anybody in the legislature. How does the legislative
6 privilege apply?

7 MR. THOMPSON: I think it is fair to say it is not
8 obvious from the face of this document whether it was given by
9 Senator Bettencourt or given to Senator Bettencourt. They are
10 talking points that apparently Senator Bettencourt was
11 considering.

12 Maybe "talking points" is the wrong word. You know,
13 it's some kind of analysis that apparently the senator was
14 considering in performing his legislative functions, and we
15 think that is sufficient to invoke the privilege based on his
16 declaration and the description in the log.

17 THE COURT: Do you know who Lori Bohannon is?

18 MR. THOMPSON: Not off the top of my head, Your
19 Honor. If you tell me how to spell the name, then I will --

20 THE COURT: Yeah. So she's listed in 24 and 25.

21 MR. THOMPSON: I'm sorry, Your Honor. Off the top of
22 my head, I don't know who that is.

23 MR. DODGE: Your Honor, I believe she's a county
24 clerk somewhere within the state.

25 THE COURT: So again, the senator's making

1 correspondence to someone not employed by the legislature and
2 so I'm having trouble understanding how that could be subject
3 to the legislative privilege, as well as 29, 30, 31, 32, 33,
4 34, 35, 36, 37. Senator Bettencourt is having some kind of
5 communications back and forth with, quote, "constituents."

6 How is that subject to the legislative privilege?

7 MR. THOMPSON: Your Honor, I think this is the same
8 issue we've been discussing. And the reason, of course, this
9 shows up on the log is that we were being up front about the
10 nature of the document.

11 THE COURT: I appreciate you guys doing that. I do.

12 MR. THOMPSON: We've had a long-standing dispute with
13 some of the parties in this case about whether it is possible
14 for the legislative privilege to extend to third parties who
15 are either members of the executive branch, or not members of
16 the state government at all.

17 So I do not at all dispute there will be documents on
18 this log that if you conclude we are wrong on that legal
19 question, then you would conclude that these documents should
20 be produced.

21 We obviously think we're right on the legal question.
22 I'm happy to get into more detail on that. Of course, it's
23 covered in the briefing so far.

24 THE COURT: Yeah. No, it's covered in the briefing.

25 And so I'm not making any final rulings, but to be

1 quite honest with you, I just can't see how it extends that
2 far.

3 But maybe what we can drill down to right now is,
4 well, how far does it extend. So let's talk about
5 communications to the lieutenant governor or to your office,
6 the OAG. And most of these communications are to the
7 lieutenant governor's office not to the governor's office.

8 If there's communications between legislators and the
9 lieutenant governor, how does that get encompassed within the
10 legislative privilege?

11 MR. THOMPSON: The lieutenant governor plays an
12 integral role in legislation and the legislative branch as in
13 Texas, as this Court probably knows. I think it's widely
14 understood that he's the president of the Senate and he has
15 probably more day-to-day involvement in legislation than even
16 the governor does. I think that's generally agreed among
17 everybody.

18 THE COURT: Well, it certainly was the case with
19 previous lieutenant governors.

20 Now, let's talk about, though, under the system of
21 the State Constitution. Under the Texas Constitution the
22 lieutenant governor falls within the executive branch, though,
23 not the legislative branch, correct?

24 MR. THOMPSON: I agree with Your Honor that the Texas
25 Constitution says the executive branch consists of, ellipses,

1 and includes lieutenant governor. It of course also gives him
2 legislative responsibilities.

3 THE COURT: So but he gets to vote, but only in the
4 event of a tie, correct?

5 MR. THOMPSON: That matches my recollection.

6 THE COURT: Does the lieutenant governor get to
7 introduce legislation?

8 MR. THOMPSON: I believe there are situations in
9 which he does but I don't want to swear to that as a matter of
10 Texas law. I know certainly that the lieutenant governor
11 often publicly releases a list of his legislative priorities
12 for what he wants to —

13 THE COURT: So does the governor. That doesn't make
14 him part of the legislature.

15 MR. THOMPSON: Well, it does, though, mean that the
16 governor gets to assert legislative privilege. There are a
17 number of cases saying that the governor can assert
18 legislative privilege —

19 THE COURT: Don't get me confused, because the
20 governor is not subject to any of this. So let's talk about
21 the lieutenant governor.

22 MR. THOMPSON: Sure. I guess, just to be clear, the
23 reason I'm talking about those cases is that everyone agrees
24 the governor is part of the executive branch in the same sense
25 the lieutenant governor is, but nonetheless, the governor can

1 assert a legislative privilege because of his legislative
2 role.

3 It's not just the issue we were talking about, the
4 legislators who have a privilege can communicate with the
5 executive branch without waiving it, it's that even if a
6 legislator does not assert legislative privilege the governor
7 can assert legislative privilege over his own documents, for
8 example, when they relate to things like how he is trying to
9 influence legislation, whether he will sign or veto it, for
10 example.

11 So cases like *Hubbard* from the Eleventh Circuit
12 included both I think a governor and a former governor.

13 *American Trucking Associations* from the First Circuit
14 included Rhode Island's former governor making a legislative
15 privilege claim.

16 This is, I think, fairly commonplace. If it is true
17 for the governor, I think it is *a fortiori* true for the
18 lieutenant governor who has a more significant legislative
19 role, in most people's view, including, I think, courts in
20 Texas.

21 THE COURT: Mr. Dodge, do you want to chime in on the
22 lieutenant governor issue?

23 MR. DODGE: Sure, Your Honor.

24 As an initial matter, I'm not aware of any case
25 within the Fifth Circuit that has recognized that the federal

1 common law state legislative privilege extends to the
2 governor. Frankly, I don't think one exists. I'm frankly not
3 aware of one that extends to the lieutenant governor.

4 The one case that they do cite addressing the
5 lieutenant governor comes from the District of Columbia, and
6 the framework that that court adopted was it concluded that
7 where a communication had to do with "one of the specific
8 enumerated duties, all of the lieutenant governor" -- who is
9 of course a member of the executive department in Texas, if he
10 was acting towards "one of his specific enumerated duties
11 toward the Senate, then the legislative privilege applies."

12 We don't actually agree with that analysis. We don't
13 think any privilege applies. We think that the D.C. Court was
14 flawed in its analysis. It relied on immunity cases rather
15 than privilege cases to make that conclusion. But even if you
16 adopt that framework, this is the only case that the lawmakers
17 cite concerning lieutenant governor.

18 Even if you adopt that framework, the lawmakers here
19 have not explained at all how any single one of the
20 communications involving the lieutenant governor's office
21 falls within the scope of one of his enumerated duties towards
22 the Senate. These are things like appointing committee
23 chairs, breaking ties, certain duties towards the committee of
24 the whole Senate.

25 But what little can be gleaned from the privilege log

1 suggests that these communications were commentary on bills
2 proposing legislation. Those are not duties of the lieutenant
3 governor under the Texas Constitution. Those are, you know,
4 things that any member of the public can do.

5 And so, you know, we disagree that this privilege
6 extends to the lieutenant governor or the governor at all.
7 The only on point case they cite offers a limited framework
8 that they have not provided any analysis under.

9 And with respect to the cases that my friend was just
10 mentioning, you know, we largely explained this in our brief,
11 but the *Hubbard* case from the Eleventh Circuit, that has been
12 distinguished by district courts within this circuit,
13 including the *Bryant* decision.

14 We also think that's a very flawed decision on its
15 own terms. It's serially conflated cases applying the federal
16 Constitution Speech and Debate Clause as well as state
17 absolute immunity with the more qualified state legislative
18 privilege.

19 And so, again, even sort of giving the lawmakers
20 every break here, I think there are two reasons why these
21 lieutenant governor communications need to be produced.

22 One, the *Holder* analysis. They haven't provided any
23 explanation how that applies here. And two, even on most of
24 these lieutenant governor communications, there is someone
25 outside of the state government involved, typically Miss

1 Alvarez, who you have identified.

2 So this isn't a situation where it's just a
3 legislator's staffer talking to the lieutenant governor's
4 office. There are typically a number of other individuals on
5 virtually all the communications at issue here with the
6 lieutenant governor's office. And so I think for those two
7 reasons in particular all these lieutenant governor
8 communications also need to be produced.

9 THE COURT: This one is a tricky one. I'm going to
10 take that one under advisement.

11 Now, the other tricky part of all this is the
12 communications with Mr. Ingram. So Mr. Ingram is employed as
13 the Director of the Secretary of State's Election Division.
14 So how does the legislative privilege apply to that?

15 MR. THOMPSON: I think it's like our discussion about
16 third party generally except perhaps even stronger. Some
17 courts that have not really confronted or agreed with our
18 position on people outside of government have, nonetheless,
19 said that executive branch officials, their involvement in
20 communications with legislators should not waive privilege
21 because it is so commonsensical the legislators would seek out
22 information and advice from executive officials with important
23 information related to the bills they want to draft and pass.

24 I think it is entirely normal, and we would expect
25 legislators to say, "Mr. Ingram, as the Director of Elections,

1 may have important information for me to consider as I draft a
2 bill." That's probably good for society as a whole to get
3 more information like that from somebody who knows what he's
4 talking about.

5 If we say that that waives privilege and that, you
6 know, is subject to discovery from anybody who can come into
7 court with an allegation of discriminatory intent, which is to
8 say everybody, then presumably people are not going to make
9 that kind of inquiry in the future and that will serve
10 everyone poorly.

11 THE COURT: But, you know, the trouble is so where do
12 we draw the line to this? So if we take this outside this
13 case, and let's go back to my oil and gas case, you are saying
14 it's commonsensical you would get advice.

15 So I'm a west Texas legislator, it would seem like
16 common sense that I call my oil and gas buddies in the area
17 and ask them how is this bill going to affect you, and all of
18 that becomes subject to a privilege?

19 MR. THOMPSON: Well, Your Honor, I think we can take
20 it even farther. We can take the hypothetical to what if it's
21 an executive branch official, to what if it's a lobbyist. If
22 Your Honor will permit me, I'll take it in the other
23 direction. What if it's a staffer.

24 I'm not sure why the staffer should be any different,
25 but the Courts have concluded they are nonetheless third

1 parties. They are not legislators. They do not own the
2 privilege. Of course, legislators in some technical sense
3 could perform their duties without confidential communications
4 with staffers. We just recognize that it would be bad for the
5 legislative process.

6 THE COURT: I don't need to go that far though. I
7 think legislators ought to be able to talk to their staffers.
8 They are paid staffers. I think that makes perfect sense. If
9 I'm making the rules, that would be subject to privilege.

10 The problem I have and what we are discussing here is
11 when it gets outside that group. It goes to the lieutenant
12 governor. It goes to Mr. Ingram. It goes to outside
13 lobbyists. It goes out to people I can't even identify in
14 these privilege logs. That's where I'm having the problem.

15 MR. THOMPSON: Let me try one more pitch then.

16 I think I understand Your Honor's need for a dividing
17 line, a limiting principle somewhere. What we would propose
18 is the limiting principle should be based on the justification
19 for the privilege in the first place. Because the
20 justification for the privilege is based on the need for
21 confidential information and advice, then the limiting
22 principle should be based on whoever has that kind of
23 pre-existing relationship for providing confidential
24 information and advice.

25 If we draw the limiting principle based on the

1 employment status of the people in the conversation, it
2 doesn't seem to be tied to the reasons we recognize the
3 privilege in the beginning.

4 THE COURT: So I think we were on Mr. Ingram.

5 Mr. Dodge, do you want to respond to that?

6 MR. DODGE: If I could, Your Honor. A couple points.

7 I mean, with respect to my friend's suggestion what
8 the limiting principle is, saying that it's whoever the
9 legislator needs to speak to in confidence is no limiting
10 principle at all. That is a mere suggestion of, you know, no
11 matter how far afield the individual is a legislator has
12 claimed that, "Oh, well, I really needed this person's input
13 on a particular piece of legislation."

14 A much more sensible limiting principle, and one that
15 is actually reflected in current Fifth Circuit law, is that it
16 should be within the legislative sphere itself, and that is
17 because the limiting principle behind the privilege is highly
18 rooted in the separation of powers.

19 The purpose of the privilege is to protect
20 legislators from investigation by the executive branch, or
21 from conviction by the judicial branch, and that's why
22 basically all Fifth Circuit law on this issue right now
23 reflects that the dividing line is the legislative sphere
24 itself.

25 If you're within the legislative sphere, privilege

1 can apply. Once you go out of it, the rational ceases because
2 you are no longer operating within the legislative branch of
3 government.

4 And you know, I don't need to go through the cases,
5 they are in our brief, but that's the current state of Fifth
6 Circuit law. The test is any outsider to the legislative
7 branch.

8 And so to that extent, current law does not recognize
9 the distinction between a man on the street or Mr. Ingram at
10 the Secretary of State's office. I certainly think it's much
11 clearer cut when you start talking about constituents,
12 lobbyists, think-tanks. But again, the sensible line is the
13 legislative branch itself.

14 MR. THOMPSON: If I may, Your Honor --

15 THE COURT: Yeah.

16 MR. THOMPSON: -- one clarification.

17 When my colleague on Zoom is talking about Fifth
18 Circuit law, I'm reasonably confident he means district courts
19 contained within the Fifth Circuit. I believe they cited one
20 Fifth Circuit case, *Jefferson*.

21 But *Jefferson*, of course, stands for the proposition
22 that the evidentiary privilege doesn't bar the adjudication on
23 the merits of the claim. Doesn't really say much about how to
24 apply legislative privilege.

25 I believe they have conceded in their reply brief

1 that they would like the Court to split with the Eleventh
2 Circuit, to disagree with the analysis in that case. Your
3 Honor well knows that the Fifth Circuit is always cheery to
4 create a circuit split. Asking the Fifth Circuit to split
5 with the Eleventh, the First, and the Ninth, would be quite a
6 lift, Your Honor.

7 MR. DODGE: Well, if I could respond to that, Your
8 Honor.

9 It's not creating a circuit split because the Fifth
10 Circuit was already very clear in the *Jefferson* decision that
11 the privilege here is qualified. That is based on Supreme
12 Court law in *Gillock*. So there would be no creation of a
13 circuit split.

14 With respect to my friend's comment about the sources
15 of law establishing that the privilege is limited sort of at
16 the border of the legislative branch, that's true that there
17 are probably seven or eight district court decisions within
18 this circuit reflecting that rule.

19 It's also wildy adopted elsewhere. I would have you
20 look, for example, at the *Lee versus Virginia State Board of*
21 *Elections* case from the Eastern District of Virginia which
22 applied the same rationale and said there is no privilege when
23 a legislator communicates with a state agency because they
24 have gone beyond their branch to speak to an outsider.

25 And, you know, with respect to sort of the handful of

1 out-of-circuit cases that the other side relies upon, again,
2 many of the cases they are discussing are not even talking
3 about legislative privilege. They are talking about entirely
4 separate legal doctrines.

5 And so, you know, they use these terms in their
6 response very loosely and you sort of have to tease out which
7 one is actually looking at a state legislative privilege
8 claim. And again, very, very small number, the minority view
9 that they relied upon are uniform cases where the analysis
10 confuses what the source of law is.

11 MR. THOMPSON: In defense of our friends in the
12 Eleventh Circuit, although they weren't confused, they just
13 disagreed with the plaintiffs. They recognize that there are
14 cases about immunity or about federal legislators and they
15 said, "We, nonetheless, believe they are analogous because
16 that is how the Supreme Court has treated them."

17 THE COURT: Yeah, I'll take --

18 MR. DODGE: Just very briefly on that point, Your
19 Honor.

20 There are some very interesting discussion in the
21 *Gillock* case that I would point the Court to. The
22 Eleventh Circuit relied on the *Brewster* decision to basically
23 say, "Well, the state legislative privilege is exactly the
24 same as the federal legislative privilege."

25 In the *Gillock* case, the Supreme Court actually

1 said -- and that case involved the prosecution of a Tennessee
2 state senator for bribery, and the Supreme Court actually
3 said, "Well, if the Speech and Debate Clause applied here,
4 none of this evidence would come in because it's an absolute
5 evidentiary privilege, but because this is not a federal
6 legislator because the Speech and Debate Clause does not
7 govern here, it's more qualified privilege," and the evidence
8 did come in.

9 And so, you know, that's sort of the final word, as
10 far as whether or not the evidentiary privilege here is
11 absolute or not, regardless of what the Eleventh Circuit said.

12 THE COURT: Okay. I'll take that under consideration
13 and I'll receive those documents in camera as well.

14 So let's look at Table C.

15 Now, this table indicates documents that there's a
16 claim of primarily attorney-client privilege. That's what I
17 want to focus on. I know in some cases work product and
18 legislative -- pardon me -- legislative privilege is also
19 asserted, but I want to focus on just the attorney-client
20 privilege.

21 So like, Line 1, who is Bill Sargent?

22 MR. THOMPSON: Off the top of my head, Your Honor, I
23 don't know who Bill Sargent is. I didn't write the log, but
24 it's a privileged statement.

25 THE COURT: Yeah. You can hopefully understand my

1 predicament here when I'm having to work just off the
2 privilege log and I can't identify the "authors," the "to,"
3 and the "from," and then say from the privilege log that a
4 document is or is not subject to the attorney-client
5 privilege. The log is deficient.

6 So now, just to be clear, I'm not going to say -- I
7 could say that the log was deficient, accordingly you have
8 waived the privilege. I'm not going to do that to you guys.

9 But I -- maybe when I see the document in camera it
10 will give me a better indication here about whether or not
11 there's, one, an attorney-client privilege; and, two, a waiver
12 of that privilege. But I can't tell from the log.

13 MR. THOMPSON: Well, Your Honor, just based on the
14 log, my understanding of what's happening in Line 1 is that we
15 have an attorney for a legislator involved and a third party
16 who was apparently providing confidential information and
17 advice for purposes of legislation.

18 I think what the log is trying to indicate is that
19 one doesn't waive the legislative privilege by having one's
20 attorney involved, and one doesn't waive the attorney-client
21 by having the legislate -- the third party providing
22 information and advice go through the legislative attorney.

23 THE COURT: So let's wait a minute here.

24 So let's go through the parameters of what
25 constitutes attorney-client privilege. One, it's a privilege

1 because there's an attorney rendering legal advice to a client
2 or a client seeking legal advice from the attorney.

3 So when we get third parties in here, like Lines 1
4 through 8 so far and there's a non-attorney, who is a
5 non-client? How do we have an attorney-client relationship,
6 much less an attorney-client privilege?

7 MR. THOMPSON: Well, so, again, I'm not speaking
8 about the document, not having it in front of me.

9 One can imagine a situation which the attorney is
10 tasked with legal work regarding the drafting of an amendment
11 or something like that.

12 One could also imagine the legislator instructing the
13 attorney to receive the information that he wants considered
14 for purposes of how to draft that legislation from someone who
15 he receives confidential information and advice. In that
16 situation, it would appear to be at the intersection of
17 attorney-client privilege and legislative privilege.

18 THE COURT: The alternative way of arguing this, is
19 this is a subterfuge to receive documents under the cloak of
20 attorney-client privilege so there won't have to be a
21 disclosure of these documents' existence.

22 MR. THOMPSON: Well, I certainly would not say that,
23 Your Honor. I think the document Your Honor has pointed to,
24 and all the ones near it that I see, seem to also assert
25 legislative privilege.

1 THE COURT: Well, who is Alan Vera?

2 MR. THOMPSON: That one I do know off the top of my
3 head. He is a member of the Harris County Republican Party
4 who frequently testifies before the legislature on election
5 integrity issues. I believe he has a title, something like
6 Chairman of the Harris County Republican Party Ballot Security
7 Committee, or something like that.

8 THE COURT: So because Mr. Vera is an author of a
9 document and sends it to a lawyer rather than sending it to
10 Senator Bettencourt directly, that now -- if the lawyer -- I
11 mean, pardon me -- if Mr. Vera had sent something to
12 Mr. Bettencourt directly, there would be no attorney-client
13 privilege, correct?

14 MR. THOMPSON: I believe that is correct. I don't
15 understand Mr. Vera to be an attorney. Of course, I could be
16 wrong.

17 THE COURT: Right. And whether he was an attorney,
18 he had to be an attorney representing the senator, right?

19 MR. THOMPSON: Agreed, Your Honor. We would need
20 both of those facts for it to be privileged under that ground.

21 THE COURT: But your argument is because he doesn't
22 send it to the senator directly and sends it to somebody who
23 is his general counsel, also now we have an attorney-client
24 privilege?

25 MR. THOMPSON: Sorry. To be clear, Your Honor, I

1 doubt -- having not reviewed the document and not written the
2 log, I doubt there would be a claim of an attorney-client
3 privilege here, if there were not also a legislative privilege
4 issue. I think what's --

5 THE COURT: Well, that's my problem. On Table C, I'm
6 looking at the log and you are asserting both. Now, I
7 understand your legislative privilege argument. What I'm
8 questioning is attorney-client privilege arguments. Am I
9 making sense?

10 MR. THOMPSON: I think you are making sense. Perhaps
11 I'm not making sense.

12 THE COURT: So, you know, so I agree with your
13 argument that may or may not be applicable as to legislative
14 privilege, but I'm focusing right now just on attorney-client,
15 and I can't see how because Mr. Vera sends something to
16 Miss Aston, that that's attorney-client. How is that
17 attorney-client?

18 *(Off the record discussion)*

19 MR. SWEETEN: What's the number?

20 THE COURT: The Document Number is 840845850865868.

21 MR. THOMPSON: Go to C3.

22 There's another numbering system.

23 THE COURT: Okay. So while Mr. Sweeten is looking
24 for that, can you help me understand why all this now becomes
25 attorney-client?

1 MR. THOMPSON: I think the attorney-client
2 relationship at issue in the document Your Honor is talking
3 about is between Miss Aston and the legislator. I think that
4 what is happening is that the log is trying to make clear that
5 the involvement of a legislator's lawyer, regardless of
6 whether that lawyer is a W-2 employee of the legislature or
7 not, should not be understood to waive the legislative
8 privilege because there is an attorney-client relationship
9 between the lawyer and the legislator. I do not think the log
10 is intended to say Mr. Vera has provided confidential legal
11 advice.

12 THE COURT: No, I understand that. No, I get that.

13 I just don't understand how a document created by
14 Mr. Vera now gets cloaked with attorney-client and
15 work-product privilege merely because it passed through
16 Miss Aston. That's the part I don't understand.

17 Did Miss Aston make any annotations, comments on that
18 that got to the senator and possibly that's how there's an
19 attorney-client relationship? But on the face of the log, I
20 can't determine that.

21 MR. THOMPSON: So I agree with Your Honor that to the
22 extent Miss Aston made comments, that would be a privilege
23 issue for attorney-client. I agree with Your Honor that
24 insofar as it is from Mr. Vera without coming from Miss Aston,
25 that's not the argument we would be making of course.

1 THE COURT: Yeah. Now let's turn to another issue
2 here.

3 So there's some documents that are apparently written
4 by a lawyer, Miss Alvarez. But then the CC list is long, and
5 it goes out to the lieutenant governor's office, to the State
6 Affairs Committee. I guess that's part of the legislature --

7 MR. THOMPSON: Yes.

8 THE COURT: -- or -- but what does it mean by
9 director? So I was thinking at first it was a State Affairs
10 Committee within the legislature, but then the word "director"
11 confused me. What is the Director of State Affairs? And I
12 don't understand that.

13 MR. THOMPSON: Your Honor, I'm happy to look at a
14 specific entry, but my understanding is that the legislative
15 staffer who sort of oversees a legislative committee is often
16 referred to as the director.

17 THE COURT: And then it goes to the Texas Legislative
18 Counsel. So let's talk about that. What do I do about the
19 Texas Legislative Counsel? They are supposed to be an
20 independent bipartisan -- I'm not sure what their existence
21 is. They work for the legislature, right?

22 MR. THOMPSON: The Texas Legislative Counsel I
23 believe is organized as an agency within the legislature.

24 THE COURT: Right.

25 MR. THOMPSON: I believe the speaker and the

1 lieutenant governor head the Texas Legislative Counsel.

2 MR. SWEETEN: And Your Honor, with respect to the
3 Texas Legislative Counsel, that is their -- they have
4 attorneys that provide advice to both Democratic and
5 Republican staffers. They try to be neutral with respect to
6 partisanship but they offer bill drafting services to
7 legislators.

8 Also, under the Government Code Section 306, I think
9 that's in the motion, but the state legislature is set out
10 that those communications are intended to be, you know,
11 confidential, that, you know, for -- open for advice. So
12 that's TLC's, you know, their function.

13 THE COURT: So help me understand, though, that. So
14 I understand there's supposed to be confidential advice so it
15 may be subject to non-disclosure for purposes of like FOIA
16 requests or something like that.

17 But let's assume it's an attorney in the Texas
18 Legislative Counsel and he's talking to a legislator. I mean,
19 has an attorney-client relationship been established such that
20 it's entitled to attorney-client privilege and work-product
21 privilege?

22 MR. THOMPSON: I think so, Your Honor.

23 So I think we may need to distinguish between TLC as
24 a whole and the individual TLC employee in any given
25 conversation. As I understand it, TLC wouldn't take any kind

1 of position on, "We should make sure this bill passes, or try
2 to stop this bill from passing," but at least as I understand
3 it if an individual TLC attorney is working with an individual
4 legislator to draft language, then they are, you know,
5 effectively on that legislator's team trying to accomplish
6 that legislator's goals.

7 THE COURT: I understand all that. And I
8 understand -- I'm not making any advisory opinions here,
9 but -- and I can understand how maybe that would be carved out
10 from FOIA, but I'm having a hard time -- let's go back to my
11 base question.

12 To have an attorney-client privilege there has to be
13 an attorney-client relationship. And so when TLC lawyers are
14 speaking with these legislators, do they understand that they
15 are their personal attorney and a client relationship has been
16 formed?

17 MR. THOMPSON: I think so, Your Honor.

18 They are -- as I understand it, legal services and
19 legal advice provided can certainly include things like bill
20 drafting. It is the sort of thing that lawyers can use their
21 legal training to do and improve.

22 I'm not aware of any reason that there would not be
23 an attorney-client relationship there when a legislator is
24 asking a licensed attorney to perform a task confidentially
25 for which the legal services of that attorney are relevant.

1 THE COURT: I mean, so the drafting of legislation
2 should -- of course, it can be done by a lawyer. I mean, it
3 doesn't have to be done by a lawyer, right? That's not
4 necessarily a legal task.

5 MR. THOMPSON: I'm sure that it's not some rule of
6 law that only lawyers can do that. I agree, Your Honor. I
7 don't think that's the test for whether there are legal
8 services though.

9 THE COURT: So are they providing legal advice in
10 these documents? Are they saying that we believe this
11 legislation as drafted this way would pass muster under these
12 legal tests, is that what these documents are talking about,
13 or what?

14 MR. THOMPSON: Well, having not read the documents
15 myself, my understanding is that the lawyers who reviewed
16 them, of course, understand what attorney-client privilege is
17 and made judgment calls about was this providing legal advice
18 or not. I think the legal advice could constitute something
19 broad, like what is the best way to draft this, but it could
20 also be something narrower of course.

21 THE COURT: Counsel, do you want to chime in on TLC?

22 MR. DODGE: Sure, and if I could address a few
23 issues, Your Honor.

24 I mean, I think the lawmakers have a big problem with
25 all the entries on this table, that the fact that their

1 counsel here can't even identify who the attorney-client
2 relationship is between on each of these entries.

3 And just going back to the first ten or so, you have
4 a private citizen and a legislator's general counsel, and
5 there's no plausible claim here that, you know, Senator
6 Hughes' general counsel, or Senator Bettencourt's general
7 counsel is in an attorney-client relationship with Mr. Vera or
8 Mr. Sargent, who is a county clerk in Galveston County, that
9 there is any attorney-client relationship there.

10 And the same goes for these TLC documents. You know,
11 there is nothing in their briefing, there's nothing in the
12 log, there's nothing in the declarations from these TLC
13 individuals where they say, "Yes, it was my understanding that
14 in communicating with Miss Alvarez, a private citizen, I
15 understood her to be my client," or "In communicating with the
16 lieutenant governor's office, I understood that staffer to be
17 my client."

18 You know, there are some attorneys on some of these
19 entries, but again it's not clear who the attorney-client
20 relationship is between.

21 And to Your Honor's question about -- or rather to I
22 think my friend on the other side, his point, if I represent a
23 client and he says, "There's a critical document down at the
24 DMV, can you go ask Jimmy at the DMV about this document," and
25 I email Jimmy or I speak to him, that's not privileged. I'm

1 doing that at the direction of my client and in the service of
2 representing him, but that's not a privileged communication at
3 all because it's a third party who is beyond the scope of the
4 attorney-client relationship.

5 And for that reason in their briefing, Your Honor, we
6 are hearing for the first time about this common legal
7 interest plan to try and pave road that they have all these
8 disparate groups and it's not clear that any of them are
9 actually clients of any of the attorneys on the
10 communications.

11 But they have done nothing to establish this common
12 legal interest. We have no declarations from any of the TLC
13 people identified. We have no declarations from Miss Alvarez.
14 We have no declarations from the lieutenant governor's office
15 saying, "When making these communications I did so with the
16 understanding that we were represented by common counsel," or
17 that, "We were represented by separate counsel but we were
18 working in conjunction towards a common legal goal," you know
19 ahead of litigation. There is absolutely no evidence of that
20 in the record.

21 With respect to the TLC, very narrowly, what the
22 Texas Code says is that "Communications with TLC attorneys
23 might be privileged if certain factors are established."
24 Again, there is nothing in the record, there are no
25 declarations from TLC attorneys actually establishing those,

1 you know, statutory requirements to establish a privilege.
2 Never mind that that statute most likely does not govern here.

3 So again, you know, it's their burden to show that
4 these are privileged documents. And the fact that counsel
5 here can't even say who the attorney-client relationship is
6 with means that they have failed to meet their burden on every
7 single one of the entries on this table.

8 THE COURT: Yeah. The closest you seem to have come
9 is, you know, there's I think -- I can't remember if it's
10 Senator Bettencourt or someone else saying, "Well, I intended
11 this stuff to be confidential." That doesn't establish any
12 attorney-client relationship.

13 It doesn't say that -- you know, it just -- you know,
14 a lot of us say things that we hope are confidential and it
15 turns out to be that's not subject to any kind of privilege at
16 all.

17 Okay. I'm --

18 MR. THOMPSON: One last point, Your Honor.

19 THE COURT: Sure. Go ahead.

20 MR. THOMPSON: There is also a declaration from
21 Jonathan White discussing the attorney-client relationship
22 there.

23 THE COURT: I remember that one too, yeah.

24 So I'm going to take all this under advisement.

25 I think it's within my authority to say there's a

1 wholesale waiver of a deficient privilege log, but I'm not
2 going to go there. And so I'm going to carefully look at each
3 of the documents, assess whether a privilege applies, what
4 privilege applies, if a privilege applies.

5 Then I'm going to go look to see whether or not the
6 *Rodriguez* five factors should or should not apply. I'm going
7 to give deference to the legislators and their staff members
8 and communications between that group, and give high deference
9 to that as I do this analysis, but I cannot make any kind of
10 final decisions today on the basis of this log.

11 Do you have those 200-and-so documents?

12 MR. THOMPSON: We do, Your Honor.

13 MR. SWEETEN: We brought all of them. They are in
14 three boxes and I can work with your staff on how to get
15 those --

16 THE COURT: 200 documents are three boxes?

17 MR. SWEETEN: They are. Well, one of them is like a
18 really big document.

19 MR. THOMPSON: My understanding is one of the
20 documents is some kind of data table or something like that,
21 just a huge number of pages that our staff printed.

22 THE COURT: This is going to be fun. If you can --
23 Miss Doxey will escort you back to chambers and give me the
24 boxes.

25 Mr. Dodge, do you want to say something?

1 MR. DODGE: Yes. One brief point.

2 There's also a fourth table in our motion, Your
3 Honor. It's the shortest. It's about their claim of a
4 lawmaker's assertion of an investigative privilege. It's one
5 document. It's only two pages.

6 And it all more or less concerns a document that Alan
7 Vera, who my colleagues on the other side mentioned before,
8 sent into -- it's not clear, either the legislator's or the
9 AG's office compiling what he alleged to be instances of
10 alleged voting irregularities or violations.

11 And so in addition to claiming legislative privilege
12 over these dozen or so documents, they also claim
13 investigative privilege. That's addressed in our briefing.
14 I'm happy to discuss it, if Your Honor would like.

15 THE COURT: Thank you. Somehow or another in all of
16 this I went to A, B, C, and I didn't get to D.

17 Are you producing documents that are subject to D as
18 well?

19 MR. THOMPSON: If by "producing," you mean we have
20 them printed out.

21 THE COURT: No. To me, for in camera review.

22 MR. THOMPSON: We have that.

23 THE COURT: Okay. I will get back to you as soon as
24 I can.

25 While we're at it, so this necessarily has a broader

1 group than just you-all, but the State today filed a motion
2 for an extension of the scheduling order, pursuant to the
3 Fifth Circuit's reversal of me on the denial of letting the
4 Texas Republican -- or not Texas -- national Republican groups
5 intervene in this case because we need more people in this
6 party.

7 I ordered them today to be allowed to intervene,
8 pursuant to the Fifth Circuit's decision. That's necessarily
9 going to result in a delay in this case. That's number one.

10 And then number two is, it's going to take me a
11 little bit to get through these rulings here on these
12 documents.

13 And, par for this course, I fully expect to have an
14 interlocutory appeal of any documents that I may decide to
15 produce, which is going to lead to yet more delay, and so that
16 ought to be a strong signal to the plaintiffs' groups.

17 I know you-all oppose and I know the US attorneys
18 oppose, it's going to be granted to some extent. You-all need
19 to work out with each other on this scheduling order, but I am
20 left with no choice, pursuant to what the Fifth Circuit has
21 ruled upon, other than to allow an extension here not to --
22 that's even apart from the valid reason that these lawyers
23 have that you guys have a lot of cases going on.

24 So you-all are ordered to meet and confer and come up
25 with an agreed upon scheduling order. If you can't, then what

1 I will entertain is a State defendants' proposed scheduling
2 order, and the plaintiffs' proposed scheduling order, and then
3 I'll make the decisions for you-all. That's not how this
4 should work though.

5 MR. SWEETEN: Your Honor, we are happy to meet with
6 plaintiffs' counsel. We will do so next week and we'll work
7 towards something that may be agreeable for a continued
8 scheduling order that would include the new intervenors and
9 all parties.

10 THE COURT: Mr. Dodge, anything else today?

11 MR. DODGE: Not on the motion to compel, Your Honor,
12 but I can tell from screens blinking on the Zoom that I think
13 a number of my co-plaintiffs' counsel would like to be heard
14 briefly on the scheduling issue, if you'll allow.

15 THE COURT: Sure. I'll just go first by who I see.

16 Mr. Freeman, do you want to say anything?

17 MR. FREEMAN: Yes, Your Honor.

18 We very much hear you with respect to the need for an
19 extension in this case. We would ask, if possible, if you
20 could let the parties know when you have availability for a
21 trial in this matter. Obviously, we don't want to build the
22 schedule around a trial date when Your Honor is not available
23 to conduct a trial.

24 We also have not heard from the Republican Party
25 intervenors as to whether they do, in fact, seek additional

1 discovery. The State's motion presupposes that, but to the
2 extent the Republican Party intervenors do not actually seek
3 additional discovery at this time, it may not be necessary to
4 actually push forward the schedule.

5 I would note --

6 THE COURT: Well, we still have the problem of the
7 Office of Attorney General having multiple litigations ongoing
8 and they need a little bit of relief.

9 MR. FREEMAN: Yes, Your Honor.

10 The concern that the United States has with respect
11 to that issue is that there is a trial set at the end of
12 September in the redistricting matter where both the Office of
13 the Texas Attorney General, and the United States, as well as
14 attorneys from MALDEF are involved in both matters, and so to
15 the extent this matter is pushed back we are going to have
16 those two matters collide.

17 The State has also asked for a stay of that matter.
18 That stay was rejected, and so we are running headlong into
19 another trial in the western district involving many of the
20 same attorneys.

21 THE COURT: Yeah. All I can tell you-all is you-all
22 are going to have to work together. I mean, you-all are the
23 lawyers in these fights and there's only so many hours and so
24 you-all need to work together.

25 So as part of this meet and confer, someone get a

1 hold of the Republican National Committee intervenors and ask
2 them what, if anything, they want to do and work them into
3 that scheduling order as well, but I was trying to be, you
4 know, limiting here about the number of fights, issues, and
5 parties in this case, but the Fifth Circuit believes otherwise
6 and so I just need to do what I'm told and that's what I'm
7 doing.

8 Who else do we have on the line?

9 Miss Yeomans, do you want to say anything?

10 MISS YEOMANS: I don't have anything to add, your
11 Honor, thank you.

12 THE COURT: Mr. Morales-Doyle.

13 MR. MORALES-DOYLE: I don't have anything to add
14 either, Your Honor, though I would ask that to the extent Your
15 Honor -- maybe this is presupposing that we can work out among
16 yourselves, but I don't know if Your Honor has any guidance
17 for us about the extent to which the Republican Party is
18 entitled to discovery, because, you know, we don't know what
19 they are going to ask for but it's going to be hard to take
20 into account --

21 THE COURT: Yeah, so --

22 MR. MORALES-DOYLE: -- what time is necessary for
23 documents.

24 THE COURT: Yeah. So that's a valid point.

25 So I'll give this general guidance. One is when you

1 ask me about trial dates, you-all feel free to coordinate with
2 Miss Fernandez and she'll tell you what my calendar looks
3 like, and so that's open to you.

4 With regard to discovery that the intervenors may
5 want, we're not going to repeat discovery. So the intervenors
6 are entitled to copies of whatever depositions have already
7 been taken, discovery documents taken.

8 But the intervenors really need to show, in my mind,
9 good cause for why they need additional discovery beyond
10 what's already been taken, with what parties have been taken,
11 because my mind-set that was going on when I denied the
12 intervention is I don't know why the intervenors couldn't just
13 file an amicus brief like other parties wanted to do.

14 If they want to assert -- I have no idea what they
15 want to do, but if they want to assert new claims, they are,
16 of course, now entitled to do so. And it could very well be
17 that they don't want more discovery, but you-all will need
18 discovery on whatever claims -- new claims they assert.

19 That's where I'm assuming this is headed, but we're
20 not going to repeat discovery for the mere prospect of
21 repeating discovery and forcing parties to waste time and
22 expenses and being duplicative in discovery.

23 So hopefully that provides some kind of guidance.

24 MR. MORALES-DOYLE: That's very helpful, Your Honor.
25 Thank you.

1 THE COURT: Anybody else, last word?

2 MR. THOMPSON: Your Honor, I think I saw Mr. Gore on
3 the Zoom, who represents the Republicans as I understand it.

4 THE COURT: Okay. Mr. Gore, do you want to say
5 anything?

6 MR. GORE: Good afternoon, Your Honor.

7 Yes. Thank you for giving us this opportunity to
8 address the discovery issue.

9 We're at a little bit of a disadvantage since we
10 haven't been involved in the discovery, so we appreciate Your
11 Honor clarifying that we are entitled to the deposition
12 transcripts and documents.

13 We are hoping to meet and confer to work out a
14 process to get those quickly so we can take stock of whether
15 we need to take any additional discovery and to what extent we
16 need to do so. So we would look forward to participating in
17 the meet and confer process to iron that out.

18 THE COURT: Are you intending to bring new claims to
19 this?

20 MR. GORE: We are not intending to bring any new
21 claims.

22 THE COURT: Oh, well, thank you. That helps.

23 So the scheduling shouldn't be impacted by that.

24 And just, Mr. Gore, you know, you are entitled to
25 discovery, but, you know, just, you know, if someone didn't

1 ask one more question that you wished would have asked, let's
2 not reopen another whole deposition just for that. There may
3 be other ways you could propound that one additional question
4 you think you need to ask, you know, but let's try to keep the
5 train moving.

6 MR. GORE: Thank you, Your Honor. Understood.

7 And as I mentioned, we appreciate Your Honor
8 facilitating our participation in the case and look forward to
9 working through these issues through that meet and confer
10 process to the extent we can.

11 MR. MORALES-DOYLE: Your Honor, if I may just ask one
12 more question. I'm sorry.

13 THE COURT: Yeah.

14 MR. MORALES-DOYLE: I think that we've been operating
15 with the presumption here that based on what you said to begin
16 with, that to the extent you are going to grant at least in
17 part the State's request, we need to meet and confer that the
18 trial date will necessarily move, but given what we have just
19 heard from counsel of the Republican Party, I do just want to
20 raise the possibility that there might be room for changing
21 some of the deadlines that we have in this case or extending
22 discovery beyond today without necessarily moving the trial
23 date.

24 And I wanted to get a sense from Your Honor before we
25 go back to the meet and confer whether you think that's a

1 possibility, or you have sort of -- you are assuming at this
2 point the trial date is moving.

3 THE COURT: So maybe it's just because I've worked
4 with Mr. Sweeten in the past case, he's looking pretty tired,
5 if you ask me, and so we can't be dragging all of us
6 collectively and running tired, and so we've got to have some
7 reasonableness in here.

8 In my mind, the way I look at the cases, the
9 important case right now is the redistricting case, just
10 because timetables have to be met and appeal decisions need to
11 be made and clerks need to understand just what's happening on
12 the ground.

13 And so that case needs to move forward and my case is
14 secondary to that one, is the way I view things and so you-all
15 need to plan accordingly around that. I understand this case
16 is also important. And so that's not to say this is not
17 important, this is as well, but we've got to work
18 collaboratively together to make this work.

19 Anything else from --

20 MR. MORALES-DOYLE: Thank you, Your Honor.

21 THE COURT: -- the Attorney General's office?

22 MR. THOMPSON: One housekeeping matter, Your Honor.

23 Your Honor alluded to the possibility of an appellate
24 review with regard to the privilege issues. I honestly don't
25 know what Your Honor is going to decide or whether the clients

1 and the appellate lawyers will want to take an appeal, but
2 they do appreciate if I ask the Court in district court
3 proceedings if the Court would consider a stay pending appeal,
4 or a short stay to allow a request for a stay, just in the
5 event that someone concludes appellate review is necessary.

6 I'm happy to do that in writing, but I understand
7 Your Honor often prefers the oral motion.

8 THE COURT: Well, let me first look at the documents
9 and see whether I even have to go there. It could very well
10 be that I say you get to keep most of these documents and only
11 a small subset goes, and if I do that, depending on how I
12 rule, then I don't think a stay would be appropriate.

13 But if I do a wholesale of everything, I could see
14 where your point is taken and I'll make that decision at the
15 time.

16 MR. THOMPSON: Thank you, Your Honor.

17 THE COURT: Okay. Miss Doxey will show you back.
18 There are three boxes.

19 Miss Fernandez, this is for you. I think that needs
20 to be docketed for a motion for new counsel in that criminal
21 case.

22 We're adjourned.

23 *(Concludes proceedings)*
24
25

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2 I certify that the foregoing is a correct transcript from
3 the record of proceedings in the above-entitled matter. I
4 further certify that the transcript fees and format comply
5 with those prescribed by the Court and the Judicial Conference
6 of the United States.

7
8 Date: 05/24/22

/s/ *Gigi Simcox*
United States Court Reporter
262 West Nueve Street
San Antonio TX 78207
Telephone: (210) 244-5037